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ARTICLES

Federalism and Supreme Court Review of Expansive State Court Decisions: A Response to Unfortunate Impressions

By DAVID A. SCHLUETER*

Introduction

In his dissenting opinion in *Pennsylvania v. Mimms*,[1] Justice Stevens criticized the Supreme Court for summarily disposing of the merits of the case without the benefit of oral argument. Doing so, he said, "creates the 'unfortunate impression that the Court is more interested in upholding the power of the State than in vindicating individual rights.' "[2] A similar "unfortunate impression" appears with ever increasing frequency as the Burger Court considers state appeals of state court decisions that have expanded the protections of federal law. At issue is the authority and the appropriateness of Supreme Court review of such decisions. Critics argue that Supreme Court review of such cases casts a chilling effect on aggressive state courts that forge new protections of individual liberty.[3] Thus, the argument continues, as a more conservative Court refuses to extend federal civil liberties protections, it also disregards state autonomy and discourages state courts

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1. 434 U.S. 106, 117 (1977) (Stevens, J., dissenting).

2. *Id.* at 124 (quoting Idaho Dept. of Employment v. Smith, 434 U.S. 100, 103 (1977)).

3. *See* Welsh, *Whose Federalism?—The Burger Court's Treatment of State Civil Liberties Judgments*, 10 HASTINGS CONST. L.Q. 819 (1983); *see also* Collins, *Plain Statements: The Supreme Court's New Requirement*, 70 A.B.A. J. 92 (1984); Collins, *High Court Asserts Its Authority*, Nat'l L.J., May 16, 1983, at 13, col. 1; Collins & Welsh, *The Court vs. Rights*, N.Y. Times, Oct. 7, 1983, § A, at 31, col. 5.

from expanding their own state constitutional law to fill the gaps left by the Court.

Some commentators appear dissatisfied with the Supreme Court's repeated expression of respect for the autonomy of state courts[4] and its frequent reminders that state courts may provide more protection for individual liberties under state law.[5] When state courts ground their expansive rulings on federal law, some would prefer that the Court abdicate its prerogative to have the final say interpreting federal law, or at least that the Court handle the case without discouraging state courts from experimenting.[6]

This Article does not focus primarily on the way in which the Court has ruled upon individual liberties; it seems clear that in some areas, such as criminal procedure, the present Court's record is mixed.[7] Rather, the Article addresses the Burger Court's view of federalism: is the Court actually reordering federal-state judicial relations at the expense of both state autonomy and individual liberties, especially the rights of state criminal defendants? Or are its dispositions of expansive state decisions giving the "unfortunate impression" that it is doing so?

Part I discusses the underlying authority of the Court to review state court decisions and the self-imposed rule that the Court will not review a state decision based on an independent and adequate state ground. This section addresses the Court's disposition of state cases where it is not clear whether an independent and adequate state ground exists and briefly touches the wide range of other jurisdictional hurdles that stand between a state court decision and plenary review by the Supreme Court.

The focus of part II shifts to the momentum created by the Warren Court's incorporation doctrine, which, coupled with recent Burger Court rulings, has led to some expansive federal rulings from state

4. *See, e.g.*, Michigan v. Long, 103 S. Ct. 3469, 3475 (1983) (respect for independence of state courts is a cornerstone in Court's refusal to decide state cases resting on independent and adequate state grounds).

5. *See, e.g.*, South Dakota v. Neville, 459 U.S. 553, 566-71 (1983) (Stevens, J., dissenting); Michigan v. Mosely, 423 U.S. 96, 120-21 (1975) (Brennan, J., dissenting); Oregon v. Hass, 420 U.S. 714, 726-29 (1975) (Marshall, J., dissenting); Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977); O'Connor, *Trends in the Relationship Between the Federal and State Courts From the Perspective of a State Court Judge*, 22 WM. & MARY L. REV. 801 (1981).

6. *See generally* Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978); Welsh, *supra* note 3.

7. *See generally* Saltzburg, *Foreword: The Flow and Ebb of Constitutional Criminal Procedure in the Warren and Burger Courts*, 69 GEO. L.J. 151 (1980) (Burger Court has reaffirmed nearly all of Warren Court criminal procedure decisions).

courts. Examined here are the problems those rulings present in our federalist judicial system—where uniformity of federal law is desired and the Supreme Court has the final word.

Finally, part III of the Article analyzes whether the Burger Court's disposition of state cases indicates respect for state autonomy or creates an unhealthy chill on state courts. In addressing that point, the Court's recent decision in *Michigan v. Long* is offered as a sensible and workable rule for maintaining the balance between state autonomy and Supreme Court supremacy. Whether the Burger Court's handling of expansive state decisions adversely affects state criminal defendants is also examined.

I. Supreme Court Review of State Court Decisions

A. The Framework

Before examining the Burger Court's treatment of state court decisions that have expanded the protections of federal law, it is important to review briefly the Supreme Court's review powers over state court decisions. The foundation is both constitutional and statutory. Article III of the Constitution places the United States' final judicial authority in the Supreme Court[8] and vests it with power to review cases "arising under the Constitution and laws of the United States."[9] That sweeping power is limited by 28 U.S.C. § 1257, which specifies the circumstances under which the Court may review a state court decision, either through certiorari or appeal.[10] In the former instance, the Court's grant of plenary review is discretionary and is available whenever, *inter alia*, "any title, right, privilege, or immunity is specially set up or claimed under the Constitution . . . ." [11] The right to appeal is available under

8. U.S. CONST. art. III, § 1.

9. U.S. CONST. art. III, § 2.

10. The provision for reviewing federal cases is located in 28 U.S.C. § 1254 (1982), which provides: Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the federal questions presented;

(3) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

11. 28 U.S.C. § 1257 (3) (1982).

more limited circumstances where the state court has struck down a federal statute as being unconstitutional[12] or rejected a similar attack on a state statute.[13] Although appeal is often considered to guarantee mandatory plenary review, it does not. The Court may consider the merits of the case but in most circumstances will summarily dismiss the appeal for lack of a "substantial federal question" without receiving briefs or hearing oral argument.[14]

The current statutory provision draws no distinction between cases in which a federal right has allegedly been denied by a state court and those in which a state court has vindicated a federal right. Prior to 1914, however, a distinction existed. The Supreme Court's review powers over state courts extended only to those cases where a federal right had been denied.[15] Apparently, the change was triggered by a New York case, *Invest v. South Buffalo*,[16] which provided an expansive ruling on the Fourteenth Amendment Due Process Clause. Congress reacted by extending Supreme Court review to cover state cases sustaining a federal claim.[17] Thus, Congress provided the state itself the opportunity to seek the Court's plenary review of a state court decision vindicating a federal right.[18]

The constitutional and statutory framework for Supreme Court review respects state autonomy. However, it also clearly and properly balances state autonomy against the ultimate authority of the Supreme Court in those state cases raising a federal issue. Thus our dual judicial system of state and federal courts exists in a delicate balance often characterized by a degree of tension and mistrust.[19]

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12. *Id.* at § 1257 (1).

13. *Id.* at § 1257 (2).

14. Some have suggested that a ruling on the substantiality of the appeal necessarily involves weighing the merits of the case. *See* Ohio *ex rel.* Eaton v. Price, 360 U.S. 246, 247 (1959); P. BATOR, D. SHAPIRO, P. MISHKIN, & H. WECHSLER, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 649 (2d ed. 1973).

15. *See* The Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 73, 85-87 (1789). *See also* Dodd, *The United States Supreme Court as Final Interpreter of the Federal Constitution*, 6 ILL L. REV. 289 (1911).

16. 201 N.Y. 271, 94 N.E. 431 (1911).

17. The change is now reflected in 28 U.S.C. § 1257(3). *See generally* F. FRANKFURTER & J. LANDIS, THE BUSINESS OF THE SUPREME COURT 188-98 (1928).

18. It has only been in the last decade that the Court has reviewed state appeals of state court decisions. When activist state courts have attempted to expand federal individual liberties beyond a line drawn by a more conservative Supreme Court, a state has a good chance of obtaining plenary review by the Court. *See* Justice Stevens' dissent in Michigan v. Long, 103 S. Ct. 3469, 3491 (1983); *see also infra* text accompanying notes 82-85.

19. *See generally* M. REDISH, FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER (1980).

The foregoing framework only presents broad guidance to the Court as to what cases it may hear. Through the years, the Court has devised a number of self-imposed templates for determining whether it will exercise its jurisdiction. The Court has stated that it will not review a state court decision that rests on independent and adequate state grounds.[20] Use of that self-imposed jurisdictional barrier has recently stirred a great deal of debate and false impressions, particularly where it is not clear whether the state court decision actually rested on such grounds.

B. The Independent and Adequate State Ground Rule: Reviewing Ambiguous State Court Decisions

Although the basis of the Supreme Court's independent and adequate state ground rule (sometimes referred to as the "nonfederal" ground rule) lies in *Murdock v. City of Memphis*,[21] the most often quoted statement of the Court's rule is from *Herb v. Pitcairn*:[22]

> This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on *adequate and independent state grounds.* The reason is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion (citation omitted and emphasis added).[23]

The self-imposed jurisdictional rule of declining jurisdiction where an adequate state ground exists is easily understood, as is the rationale behind it. Applying the rule, however, is no easy task because state courts do not always spell out whether they relied on state grounds, federal grounds, or both.

First, there is the problem of defining an "*independent* and *adequate* state ground." The clearest case arises where the state court has

20. *See, e.g.,* Michigan v. Long, 103 S. Ct. at 3474-76; Herb v. Pitcairn, 324 U.S. 117, 125 (1945).

21. 87 U.S. (20 Wall.) 590 (1874).

22. 324 U.S. 117 (1945).

23. *Id.* at 125-26.

relied on its state constitution without any reference to federal law.[24] In that instance the state ground will be viewed as both *adequate* and *independent.* On the other hand, where the state court relies heavily on federal principle and precedent and summarily cites its state constitution as sole or alternate grounds for its decision, the state grounds may be *adequate* but not *independent.*[25] The Court is particularly watchful of arbitrary or contrived state procedural grounds that are invoked by state courts to frustrate litigation of federal issues.[26] The Court has also noted that the mere fact that the state court might have relied on a state ground will not be sufficient to bar jurisdiction.[27]

Second, there is the problem of dealing with those cases where the state court has either intertwined the state and federal grounds or summarily stated that both the federal and state constitutions require the result reached.[28] The Supreme Court's inconsistent treatment of those ambiguous decisions has lead to some unfortunate impressions as to the Supreme Court's motives.[29] Those impressions stem in part from the belief that whenever the Supreme Court reviews a state court decision, it intrudes, to some degree, upon state autonomy. That conclusion is not a recent invention; it stems from the very tensions at work in *Martin v. Hunter's Lessee*[30] when the Court first held that state court decisions were subject to judicial review.

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24. *See, e.g.*, People v. Anderson, 6 Cal. 3d 628, 493 P.2d 880, 100 Cal. Rptr. 152, *cert. denied*, 406 U.S. 958 (1972).

25. *See, e.g.*, Michigan v. Long, 103 S. Ct. at 3474 (state court relied almost exclusively on federal law and only summarily cited what could have been adequate independent state grounds).

26. *See* Henry v. Mississippi, 379 U.S. 443 (1965). *See generally* Sandalow, Henry v. Mississippi *and the Adequate State Ground: Proposals for a Revised Doctrine*, 1965 SUP. CT. REV. 187.

27. Beecher v. Alabama, 389 U.S. 35, 37 n.3 (1967).

28. Where both state and federal grounds are intertwined, the Court must sort them and determine whether the state ground is both independent of the federal ground and adequate, standing alone, to support the state court's judgment. Several commentators have suggested that where the state decision presents mixed grounds for its judgment, the Court should grant review. *See* Bice, *Anderson and the Adequate State Ground*, 45 S. CAL. L. REV. 750, 760-61 (1972) (author suggests that where the state decisions are ambiguous the Court should always grant reveiw); Note, *State Constitutional Guarantees as Adequate State Ground: Supreme Court Review and the Problem of Federalism*, 13 AM. CRIM. L. REV. 737, 759 (1976) (author suggests that where grounds are mixed, Court could find no independent and adequate state ground).

29. *See generally* Welsh, *supra* note 3. Professor Welsh concludes that the Court vacates and remands state decisions with the hope of discouraging state courts from invoking state law and thus blocking federal judicial review. *See also infra* notes 44-46 and accompanying text.

30. 14 U.S. (1 Wheat.) 304 (1816).

Where the state court clearly rests its judgment solely on state law grounds, such as its own constitution, the Supreme Court's action is virtually automatic; it declines plenary review.[31] When the state court has not stated clearly what law is deciding the case—federal or state—the Court has exercised several options. None of the options is, by the Court's own admission, entirely without problems.[32]

1. Dismissing the Case

When the basis of a state court decision is not clear, the Supreme Court's first option is to dismiss the case on the theory that where the state court's reasoning is ambiguous, it is better to assume that an independent and adequate ground exists.[33] This option respects state courts because it does not intrude upon a state's affairs. It is clearly consistent with the Court's careful allocation of its time and resources, and there is no risk of rendering an advisory opinion.[34]

But there is a cost in dismissing state court decisions where the court may have relied on federal law without an independent and adequate state ground.[35] When state courts can modify federal law at will and insulate their decisions from Supreme Court review, uniformity in federal law is threatened. This is not to suggest that the Court should grant plenary review in all such cases. Rather, the point is that the Court itself recognizes the risks of simply declining to review any ambiguous state court decision.[36]

2. Deciding for Itself What the Law Is

Assuming the Court declines to dismiss the case, it may attempt to decipher the state law and then decide whether the state court applied it.[37] This path also presents obvious problems. The Court recognizes that state courts are in the best position to determine state law.[38] Further, the task of deciding that issue is time consuming for the Court.

31. *See, e.g.*, Michigan v. Long, 103 S. Ct. at 3476; Fox Film v. Muller, 296 U.S. 207, 210 (1935).

32. Michigan v. Long, 103 S. Ct. at 3474-75.

33. Lynch v. New York *ex rel.* Pierson, 293 U.S. 52 (1934).

34. *See supra* notes 22-23 and accompanying text.

35. *See* Minnesota v. National Tea Co., 309 U.S. 551 (1940). *See also infra* notes 40-41 and accompanying text.

36. Michigan v. Long, 103 S. Ct. at 3475.

37. *See, e.g.*, Texas v. Brown, 460 U.S. 730 (1983).

38. Michigan v. Long, 103 S. Ct. at 3475.

3. Asking the State Court for Clarification

The third option is probably the surest way of determining the basis of the state court's judgment: asking the state court for clarification. Clarification can take the form of either obtaining a certificate from the state court[39] or vacating and remanding to the state court. Although certification is rarely used, the vacate and remand procedure has been used often. It is this procedure that has generated a great deal of criticism of the Court. The underlying rationale for the vacate and remand method was stated clearly by the Court in *Minnesota v. National Tea Co.*:[40]

> It is important that this Court not indulge in needless dissertations on constitutional law. It is fundamental that state courts be left free and unfettered by us in interpreting their state constitutions. But it is equally important that ambiguous or obscure adjudications by state courts do not stand as barriers to a determination by this Court of the validity under the federal constitution of state action. Intelligent exercise of our appellate powers compels us to ask for the elimination of the obscurities and ambiguities from the opinions in such cases. Only then can we ascertain whether or not our jurisdiction to review should be invoked. Only by that procedure can the responsibility for striking down or upholding state legislation be fairly placed. For no other course assures that important federal issues, such as have been argued here, will reach this Court for adjudication; that state courts will not be the final arbiters of important issues under the federal constitution; and that we will not encroach on the constitutional jurisdiction of the states. This is not a mere technical rule nor a rule for our convenience. It touches the division of authority between state courts and this Court and is of equal importance to each. Only by such explicitness can the highest courts of the states and this Court keep within the bounds of their respective jurisdictions.[41]

39. *See, e.g.*, Herb v. Pitcairn, 324 U.S. 117 (1945). In this procedure the case is continued on the Court's docket pending a response from the state court. Justice Jackson, writing for the Court, justified this option on the ground that "it seems consistent with the respect due the highest courts of states of the Union that they be asked rather than told what they have intended." *Id.* at 127-28. This method, however, creates burdens for the state courts and can cause problems. In Dixon v. Duffy, 344 U.S. 143, 145 (1952), the Court continued the case twice before finally vacating and remanding it when the state court advised that it doubted it even had jurisdiction to provide clarification. *See also* Philadelphia Newspapers, Inc. v. Jerome, 434 U.S. 241, 244 (1978) (Rehnquist, J., dissenting); Wolfson & Kurland, *Certificates by State Courts of the Existence of a Federal Question*, 63 HARV. L. REV. 111 (1949).

40. 309 U.S. 551 (1940).

41. *Id.* at 557.

This statement sums up effectively the delicate balance between state autonomy and federal supremacy. The vacate and remand rule is neutral on its face; it favors neither interest.[42]

As some state courts seem increasingly willing to hand down expansive rulings,[43] however, the need to decipher ambiguous decisions has become a matter of concern. And as the Supreme Court has struggled with those decisions before granting or denying plenary review, some commentators have registered sharp criticism of the remand and clarify option.

Their fundamental criticism is that by remanding the case to the state court for clarification, the Supreme Court challenges the state court to a "battle of wills" and tells the state court not to expand civil liberties protections.[44] A remand also places the state courts in a position of either toeing a more conservative federal line or risking political retaliation at home.[45] Some critics further contend that because on remand state courts sometimes "clarify" their earlier decisions to rest on federal grounds[46]—opening themselves for federal judicial review—the Supreme Court is, in effect, intimidating state courts. These arguments read a great deal of ill-will into the Court's dealings with state courts. They also ignore, or disbelieve, the repeated reminders by both the liberal and conservative members of the Court that the Court "respects" state autonomy and the authority of state courts to expand state civil liberties.[47]

A recent case cited by the critics to support their position is *Montana v. Jackson*.[48] The Montana Supreme Court in its first decision (*Jackson I*) relied upon both federal and state constitutional law to support its decision prohibiting a state prosecutor from offering into evidence a motorist's refusal to submit to a breathalyzer test.[49] The state appealed. Shortly after deciding the same issue in *South Dakota*

42. *Cf.* Welsh, *supra* note 3, at 843-56.

43. *See infra* notes 111-17 and accompanying text.

44. *See* Welsh, *supra* note 3, at 819-23.

45. *See infra* note 150.

46. *See* Welsh, *supra*, note 3, at 847. Professor Welsh argues that statistics for the 1970-1982 Terms show that in only 4 of 16 cases remanded for clarification did state courts respond that their decisions rested exclusively on federal grounds. In the remainder the state courts presumably relied on state grounds. If indeed the Court is relying upon a "battle of wills" as Welsh suggests, the Court is not doing very well. The better conclusion would be that the Court remanded those cases solely for the purpose of determining whether it had jurisdiction, and not to tell the state courts how to decide their cases.

47. *See supra* note 5 and accompanying text.

48. 460 U.S. 1030 (1983).

49. State v. Jackson, 195 Mont. 185, 637 P.2d 1 (1981) (*Jackson I*).

v. Neville,[50] the Supreme Court vacated and remanded *Jackson I* to the state court for consideration of whether its decision rested on federal or state grounds, and if on federal grounds, to reconsider it in light of *Neville*.[51] In dissent, Justice Stevens argued that the Montana court's decision was clearly based on state law because the court had repeatedly cited the Montana constitution.[52]

The number of times a state court cites its own state's law is not as important as determining whether the state grounds are actually *independent* of federal law. In *Jackson I*, the Montana court had relied on both federal and state law. The state's attorney general argued to the Court that an earlier Montana decision indicated that the breadth of the state law was dictated by the breadth of the Fifth Amendment as delineated by the Court.[53] Clearly, there was a genuine question as to whether the state grounds in *Jackson I* were indeed independent.

On remand in *Jackson II*,[54] a newly constituted Montana Supreme Court[55] observed that the *Jackson I* opinion had indeed cited sections of the state's constitution. The *Jackson II* court discussed the state case law cited in that opinion and concluded:

> In sum, we read the [first] *Jackson* opinion as based primarily on United States Supreme Court decisions interpreting the Fifth Amendment to the United States Constitution. Any reference to the state constitution is not independent of the federal constitutional decisions interpreting the Fifth Amendment. No reasons are given nor an analysis made for extending our state constitutional protections against self-incrimination beyond that afforded by its federal counterpart.[56]

Applying the federal constitutional law of *South Dakota v. Neville*,[57] the Montana court reversed its earlier decision and ruled that a motorist's refusal to give a breathalyzer test could be introduced at trial. Two justices who had been in the majority in *Jackson I* registered vehement dissents. Justice Sheehy wrote:

> Instead of knuckling under to this unjustified expansion of federal judicial power into the perimeters of our state power, we

50. 459 U.S. 553 (1983).

51. *Jackson I*, 460 U.S. 1030 (1983).

52. *Id.* at 1030-32 (Stevens, J., dissenting).

53. State v. Finley, 173 Mont. 162, 566 P.2d 1119 (1977). *See* Welsh, *supra* note 3, at 849.

54. State v. Jackson, 672 P.2d 255 (1983).

55. Following *Jackson I*, one of the justices in the *Jackson I* majority, Justice Daly, was replaced by Justice Gulbrandson. In *Jackson II*, he joined the three *Jackson I* dissenters to form a new majority.

56. 672 P.2d 255, 258 (1983).

57. 459 U.S. 553 (1983).

> should show our judicial displeasure by insisting that in Montana, this sovereign state can interpret its constitution to guarantee rights to its citizens greater than those guaranteed by the federal constitution.[58]

The author of the majority opinion in *Jackson I*, Justice Shea, admitted that he had underestimated the extent to which the Supreme Court would intrude on a state court's prerogative to interpret its own constitution.[59] Justice Shea continued:

> I suggest that the provisions of our own constitution do have meaning independent of the interpretations given to the United States Constitution, and that so long as we do not deny rights guaranteed by the United States Constitution, we can and should, where the situation arises, interpret our own constitution to give more rights than those granted by the United States Constitution. But the majority has abdicated that responsibility by holding that provisions of our constitution " 'substantially identical' " (whatever that means) with provisions of the United States Constitution can get their meaning only from the United States Supreme Court. It seems the majority has adopted the philosophy suggested by Chief Justice Burger in *Florida v. Casal*, and would permit the United States Supreme Court to tell us what our state constitution means.[60]

Critics rally around these dissents as a prime example of the Court's intent to thwart state courts' attempts to expand individual liberties.[61] Yet the dissenters also have misapprehended the meaning of the Court's remand. The Court did not tell the Montana Supreme Court, either expressly or impliedly, what its "state constitution means." Instead, it asked the state court to clarify its first decision and tell the Court whether it relied on federal or independent and adequate state law. What the Montana Supreme Court did from that point on was a matter solely within its discretion. Apparently, the *Jackson II* dissenters would rather have had the Supreme Court view the state court's first decision as nonreviewable because the court had repeatedly cited the state constitution.

The Montana Supreme Court's decision in *Jackson I* was "expansive" in that it extended the privilege against self-incrimination beyond the *federal* constitutional line later drawn by the Supreme Court in

58. 672 P.2d at 260 (Sheehy, J., dissenting).

59. *Id.* at 262 (Shea, J., dissenting).

60. *Id.* at 264-65. In *Casal*, 103 S. Ct. 3100, 3101-02 (1983), the Chief Justice reminded the state that it could legislatively emasculate the exclusionary statute upon which the state courts had relied.

61. *See supra* note 3 and accompanying text.

South Dakota v. Neville.[62] Thus, when faced with the first *Jackson* opinion, the Court had several options. First, it could have viewed the ambiguous state decision as resting on federal law and could have reversed and remanded in light of *Neville*. That course would have been unnecessarily intrusive if the state court had not in fact rested its decision on federal grounds. Second, the Court could have denied plenary review by treating it as a question of *state* law. But that option could have insulated a possible expansion of federal law from Supreme Court review, serving state autonomy at the expense of federal supremacy and uniformity. The third option, and the one selected by the Court, was the most appropriate under the circumstances. The Court remanded the case to the state court for clarification and *possible* reconsideration. Arguably, the Court demonstrated its respect for state autonomy by permitting the Montana court to tell the Supreme Court what grounds it relied upon.

The ultimate decision thus rested with the Montana court. The Montana court could simply have said that its decision rested on state grounds and that whatever federal law it had cited in its first decision did not compel the result, but served only as other persuasive precedent.[63] That ruling would have insulated an expansive ruling from further Supreme Court review. Instead, the state court ruled that its judgment would rest on federal law and applied the Court's ruling in *Neville*.

Did the Supreme Court compel the result in *Jackson II*? Clearly it did not. The decision resulted from a change in membership on the Montana Supreme Court coupled with the shift of one member who stated that in the first *Jackson* opinion he had not been concerned with independent state grounds.[64]

62. 459 U.S. 553 (1983). The Court recognized that under Schmerber v. California, 384 U.S. 757 (1966), a driver suspected of driving while intoxicated could be forced to submit to a blood-alcohol test. Therefore, because the state could compel him or her to submit, the state could also give the driver the choice of either submitting to the test or having his or her refusal used against him or her at trial.

63. In several cases where the state court's decision presented mixed grounds, the Supreme Court has exercised jurisdiction where the state court felt compelled by federal constitutional law to interpret its state law as it did. *See, e.g.*, Delaware v. Prouse, 440 U.S. 648, 653 (1979). In Michigan v. Long, 103 S. Ct. at 3476, the Court noted that the state courts should distinguish between those cases where it feels compelled to follow federal law and those cases where it finds federal law merely persuasive.

64. Justice Morrison had concurred with the majority in *Jackson I*. In *Jackson II*, he authored a special concurring opinion in which he joined the court only in the result. He registered disagreement with the Supreme Court's reading of the Fifth Amendment in *Neville* but felt bound to follow it because the state and federal constitutional provisions were identical.

It is important to note that the Court's remand in *Jackson* did not result simply because the Montana court had provided an expansive ruling; the ambiguous grounds for the state decision triggered it. Critics argue that the basis for the state court's *Jackson I* decision was clear,[65] but if there is any room for doubt it certainly seems reasonable for the Court to seek clarification. Rather than choosing outright between state autonomy and federal supremacy, the Court provided the state itself with the option of indicating beyond any doubt that its first decision, although expansive, was not grounded in federal law.

Aside from ideological concerns over intruding upon state autonomy, the Court has been frustrated by the problem of deciding on an *ad hoc* basis whether a state court has actually rested its judgment on independent and adequate state grounds.[66] The frustration is due in part to the collision of state court decisions that challenge the Supreme Court's view of federal law, and a conservative Court that holds the line on civil liberties while simultaneously professing respect for state autonomy.[67] The problem is further compounded by a growing workload burden and a realization that the foregoing options dealing with ambiguous state court decisions are inadequate. This frustration recently led the Court to adopt a new "assumption" rule.

4. The Michigan v. Long *"Assumption" Rule*

In *Michigan v. Long*,[68] the Supreme Court addressed a decision by the Michigan Supreme Court that relied primarily on federal law for the proposition that *Terry v. Ohio*[69] did not permit a protective search of a car's interior. The state court summarily noted that the Michigan Constitution required the same result.[70]

Justice O'Connor, writing for a majority of five Justices, noted the foregoing methods of resolving ambiguous state decisions and the shortcomings of each.[71] No longer wishing to decide state law or to ask the state courts to clarify their decisions, the Court set forth the new procedure:

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65. *See* Welsh, *supra* note 3, at 850.

66. *See* Michigan v. Long, 103 S. Ct. at 3475, where the Court noted that such an *ad hoc* approach is "antithetical to the doctrinal consistency that is required when sensitive issues of federal-state relations are involved." *Id.*

67. *See also infra* notes 108-10 and accompanying text.

68. 103 S. Ct. 3469 (1983).

69. 392 U.S. 1 (1968).

70. 413 Mich. 461, 471 n.4, 320 N.W.2d 866, 869 n.4 (1982).

71. Michigan v. Long, 103 S. Ct. at 3474-75.

> Accordingly, when, as in this case, a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so. If a state court chooses merely to rely on federal precedents as it would on the precedents of all other jurisdictions, then it need only make clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached. In this way, both justice and judicial administration will be greatly improved. If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision.[72]

Justice O'Connor noted that this rule would eliminate both the Court's need to examine state law[73] and the danger of advisory opinions,[74] and would encourage state courts to develop state law without Supreme Court intervention.[75] After applying the new rule to the facts of the case, the Court concluded that the Michigan Court had felt compelled by its reading of federal constitutional law to construe state law in an expansive manner; the proferred state grounds,[76] therefore, were not independent.[77] Turning to the merits, the Court extended *Terry v. Ohio*[78] to include a protective search of the passenger compartment of an automobile.[79]

Justice Blackmun filed a brief concurring opinion in which he agreed that the court had jurisdiction to review the case, but he could not join in the adoption of a rule that, in his view, increased the danger of issuing advisory opinions.[80] Justice Brennan, joined by Justice Mar-

72. *Id.* at 3476.

73. *Id.* The Court added in a footnote, however, that seeking clarification might be desirable or necessary in certain circumstances. *Id.* at n.6.

74. *Id.* at 3476. The danger of rendering an advisory opinion is one of two justifications for not reviewing independent and adequate state grounds. *See supra* notes 22-23 and accompanying text. Apparently, the Court feels that if a state court follows the *Michigan v. Long* rule and is clear about the basis of its decision, the Court will be able to decide whether it should exercise jurisdiction without fear of guessing wrong and of the state court's later stating that its decision did in fact rest on an independent and adequate state ground.

75. Michigan v. Long, 103 S. Ct. at 3476.

76. The Michigan Supreme Court cited its state constitution in two places in the opinion. The greater portion of its support was gathered from *Terry v. Ohio* and its progeny.

77. 103 S. Ct. at 3477-78.

78. 392 U.S. 1 (1968).

79. 103 S. Ct. at 3480-81.

80. *Id.* at 3483 (Blackmun, J., concurring).

shall, dissented on the merits but expressed no views on the new "assumption" rule; he simply agreed in a footnote that the Court had jurisdiction.[81]

In a dissent that focused exclusively on the new jurisdictional rule, Justice Stevens challenged the rule as being unduly intrusive on state autonomy. According to Justice Stevens, the Court should only review those state cases in which a federal right has been *denied*.[82] To do more would be a misallocation of the Court's resources;[83] just as the Court has no business telling a court in Finland how to decide questions of American law, so too the Court should refrain from telling the state courts how to decide cases.[84] In Justice Stevens' view, uniformity in federal law is not a compelling reason for review of state court decisions.[85]

Perhaps *Michigan v. Long* best demonstrates the practical problems the Court faces in screening state cases and the frustrations necessarily caused by ambiguous state decisions. As the Court has used one device after another to gauge whether plenary review is appropriate, it has repeatedly walked the thin line of balancing its respect for state autonomy against the command of the Supremacy Clause. Ambiguous state decisions tend to throw the balance off. The new *Michigan v. Long* jurisdictional rule strikes a good balance.[86] But it nonetheless gives the impression to some critics that the Court is telling state courts how to decide their cases.[87] It is not. At most, the Court runs the risk of erroneously concluding what ground—state or fed-

81. *Id.* at 3483 n.1 (Brennan, J., dissenting). That footnote in turn cited footnote 10 in the majority opinion, which discussed why the Court felt it had jurisdiction over the case regardless of the new assumption rule. To reach that conclusion, the majority applied Michigan law.

82. 103 S. Ct. at 3491 (Stevens, J., dissenting).

83. *Id.* Justice Stevens noted the expanding number of cases in which the state appeals a state court ruling. For further comments by Justice Stevens on the problems of allocating the Court's resources, see Stevens, *Some Thoughts on Judicial Restraint*, 66 JUDICATURE 177 (1982).

84. 103 S. Ct. at 3490 (Stevens, J., dissenting). The comparison is not appropriate. Where the state courts decide matters of federal law, the Supremacy Clause permits the Supreme Court to state whether the state court's judgment was in accordance with the United States Constitution. Indeed, it might be argued that the Supremacy Clause *requires* the Supreme Court to rule on the matter.

85. 103 S. Ct. at 3491. See *infra* notes 122-37 and accompanying text for a discussion on the need for uniformity in federal law.

86. *See infra* notes 145-50 and accompanying text.

87. *See, e.g.*, Collins, *Plain Statements: The Supreme Court's New Requirement*, *supra* note 3, at 92-94.

eral—the state court actually used to decide the case.[88] But that risk primarily concerns what state cases the Court should hear. It does not tell the state courts how to resolve state law questions.

It should be noted that the existence of an independent and adequate state ground presents only one of many jurisdictional barriers facing the petitioner or appellant. He or she must also establish that the state decision is a final valid judgment[89] on a substantial federal question[90] from the state's highest court.[91] Furthermore, the Court will measure the case against a long list of nonstatutory criteria that have arisen through practice and tradition.[92]

It is indeed an "unfortunate impression" that the Supreme Court prowls about looking for expansive state court decisions and stretches its jurisdiction to snare them. Even a cursory review of state court decisions that have been granted plenary review demonstrates that many involved timely, important and nationwide issues as to which conflicts existed among state courts or between state and federal courts.[93] That trend will no doubt continue, even with the arrival of the *Michigan v. Long* rule.

Nevertheless, the Court will continue to scrutinize expansive state court rulings.

II. Expansive State Court Rulings and the Burger Court Restraints

Although it is incorrect to assume that the Burger Court is set on dismantling state court decisions that expand individual liberties, it is clear that the Court will closely examine state court decisions which rely on federal law to expand those liberties. It is now generally accepted that although the Supreme Court sets the minimum level of fed-

88. This type of risk is associated with advisory opinions. On remand the state court can discount the Supreme Court's decision by stating that the court misinterpreted the state court's first decision; e.g., the decision actually rested on independent and adequate state grounds and should not have been reviewed by the Court.

89. 28 U.S.C. § 1257 (1982).

90. *See* 28 U.S.C. § 1257 (1982); R. STERN & E. GRESSMAN, SUPREME COURT PRACTICE 208-30 (5th ed. 1978).

91. 28 U.S.C. § 1257 (1982).

92. Other justiciability hurdles include ripeness, standing, and mootness. *See* L. TRIBE, AMERICAN CONSTITUIONAL LAW 62-71, 79-89 (1978).

93. *See, e.g.*, Minnesota v. Murphy, 104 S. Ct. 1136, 1141 (1984). *See generally* R. STERN & E. GRESSMAN, *supra* note 90, at 254-336. Supreme Court Rule 19.1(b) lists conflicts among jurisdictions as a reason for granting plenary review.

eral protection of civil liberties, state courts are free to experiment[94] and increase protection under state law.[95] It is less well known that the Court in many respects also sets the ceiling on federal protections[96] in its efforts to maintain uniformity in federal law.[97]

Assuming the Burger Court is wary of activist state courts, the question becomes whether it is so because it is a "conservative" court or because it sees uniformity in federal law as a necessary goal. The short answer is that it is probably for both reasons. The longer answer requires a brief review of why the Court would even be criticized for setting a federal ceiling and carefully scrutinizing expansive state court decisions.

A. Warren Court Momentum: Incorporation and State Court Response

Few would quarrel with the statement that in the past several decades the single most dramatic development in federal-state relations came from the Warren Court's "incorporation" cases. Of course, the Warren Court was not the first to hold that particular provisions of the Bill of Rights were applicable to the states through the Fourteenth Amendment's Due Process Clause.[98] But it was during the Warren Court era that virtually all of the Bill of Rights provisions were applied to the states.[99] The scope of the Court's selective incorporation was due in part to the reluctance of state courts to broaden criminal procedure rights of state defendants.[100] Implicit in the incorporation cases was a

94. The states are often referred to as "laboratories" for determining new bounds for individual rights. *See* McCray v. New York, 103 S. Ct. 2438, 2439 (1983) (Stevens, J., opinion on denial of *cert.*); Johnson v. Louisiana, 406 U.S. 356, 376 (1972); Note, *Of Laboratories and Liberties: State Court Protection of Political and Civil Rights*, 10 GA. L. REV. 533 (1976).

95. *See supra* note 5 and accompanying text.

96. *See, e.g.*, Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 461 n.6 (1981); Oregon v. Hass, 420 U.S. 714, 719 (1975).

97. *See infra* note 136 and accompanying text.

98. *See In re* Oliver, 333 U.S. 257 (1948) (right to public trial); Fiske v. Kansas, 274 U.S. 380 (1927) (First Amendment rights); Chicago B & Q R.R. Co. v. Chicago, 166 U.S. 226 (1897) (just compensation for property taken by state).

99. Duncan v. Louisiana, 391 U.S. 145 (1968) (trial by jury in criminal case); Washington v. Texas, 388 U.S. 14 (1967) (compulsory process for witnesses); Klopfer v. North Carolina, 386 U.S. 213 (1967) (speedy trial); Pointer v. Texas, 380 U.S. 400 (1965) (confrontation of witnesses); Malloy v. Hogan, 378 U.S. 1 (1964) (self-incrimination); Gideon v. Wainwright, 372 U.S. 335 (1963) (right to counsel); Mapp v. Ohio, 367 U.S. 643 (1961) (Fourth Amendment exclusionary rule).

100. For example, in Wolf v. Colorado, 338 U.S. 25 (1949), the Court declined to extend the Fourth Amendment exclusionary rule to the states so that the states would have an adequate opportunity to adopt or reject the rule. *See, e.g.*, Irvine v. California, 347 U.S. 128,

sense of mistrust for the state courts and the view that federal criminal defendants were "better off" than their state counterparts.[101] Because state courts had almost always applied those rights more narrowly than the Supreme Court, it was the appeal of the state defendant that was heard. Ironically, as the Warren Court expanded and incorporated individual liberties, it "intruded" upon state autonomy, arguably showing little respect in the process.

The initial state response was understandably hostile and defiant.[102] The Warren Court's posture was, in the view of some, an undue expansion of federal power that chilled state experimentation with criminal procedures.[103] Justice Harlan even suggested that imposition of federal standards on states would ultimately dilute the federal standards themselves if the Court allowed leeway in state court application of the standards.[104] Although the states have always been free to establish greater state law protections,[105] the Warren Court's expansive federal rulings tended to overtake whatever expansive state rulings might have been forthcoming. Thus, there was little need for the Court to hold back state courts eager to expand individual rights beyond the federal limits set by the Supreme Court.

The state courts' initial defiance of Supreme Court intervention, however, eventually cooled. Although some argue that state courts eventually recognized the worth of the Warren Court's expansive decisions,[106] the arrival of the more conservative Burger Court no doubt helped sooth state court feelings.[107]

Ironically, as the Burger Court registered an intent to "hold the line" on individual rights (especially in the area of criminal procedure)

134 (1954). When by 1961 only one-half of the states had adopted the rule, the Court made it applicable to the states in Mapp v. Ohio, 367 U.S. 643 (1961). *See generally* Traynor, Mapp v. Ohio *at Large in 50 States*, 1962 DUKE L.J. 319.

101. *See, e.g.*, C. WHITEBREAD, CRIMINAL PROCEDURE § 28.01, at 574 (1980) (Warren Court seemed to act on the premise that state courts could not be counted on to vindicate newly created federal rights); *Project Report: Toward an Activist Role for State Bills of Rights*, 8 HARV. C.R.-C.L. L. REV. 271, 283 (1973).

102. *See* Sheran, *State Courts and Federalism in the 1980's: Comment*, 22 WM. & MARY L. REV. 789, 791 (1981) (Chief Justice of the Supreme Court of Minnesota observes that the state response was "hostile and defensive").

103. *See* Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CALIF. L. REV. 929, 953-56 (1965).

104. Williams v. Florida, 399 U.S. 78, 118 (1970) (Harlan, J., concurring in result).

105. *See supra* note 5 and accompanying text.

106. *See* Sheran, *supra* note 102, at 791.

107. *See* Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873, 905 (1976) (author observes that many state courts lean toward a more conservative posture).

a handful of state courts turned to their state law to adopt, or retain, more protective standards.[108] The momentum for expanding individual rights that rested in the Supreme Court during the Warren era shifted back to the states. A number of state courts have heeded the advice of both commentators[109] and some Justices,[110] and have used state law to re-extend rights limited by the Burger Court.

Several recent cases illustrate the point. In *United States v. Ross*[111] and *New York v. Belton*,[112] the Supreme Court expanded police officers' authority to search vehicles. In *Ross*, the Court ruled that warrantless probable cause searches could extend to all portions of the vehicle, including closed containers. In *Belton*, the Court ruled that following an arrest, a warrantless search of the passenger compartment was permitted. Those opinions, which narrowed the protections of the Fourth Amendment, were rejected by the Washington Supreme Court in *Ringer v. State*.[113] That court considered two consolidated cases involving warrantless automobile searches. In each case the scenario was the same: the defendant had been arrested and handcuffed after getting out of his vehicle; the officers then conducted searches of the vehicles and found contraband. The court noted that under federal law, i.e., *Ross* and *Belton*, the searches would be valid. However, it relied on state law to invalidate the searches. The opinion demonstrates the contemporary rationale of state court "momentum":

> We perceive three stages in the prior development of the search incident to arrest exception to the warrant requirement. The exception began as a narrow rule intended solely to protect against

108. *Id.* at 874-75. *See also* Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 495 (1977).

109. *See, e.g.*, Aldisert, *State Courts and Federalism in the 1980's: Comment*, 22 WM. & MARY L. REV. 821 (1981); Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605 (1981); Countryman, *Why a State Bill of Rights?*, 45 WASH. L. REV. (1970); Falk, *The State Constitution: A More Than "Adequate" Nonfederal Ground*, 61 CALIF. L. REV. 273 (1973); Fleming & Nordby, *The Minnesota Bill of Rights: "Wrapt in the Old Mismal Mist,"* 7 HAMLINE L. REV. 51 (1984); Force, *State "Bill of Rights": A Case of Neglect and the Need for a Renaissance*, 3 VAL. U.L. REV. 125 (1969); Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873 (1976); Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U. BALT. L. REV. 379 (1980); Note, *Stepping Into the Breach: Basing Defendants' Rights on State Rather Than Federal Law*, 15 AM. CRIM. L. REV. 339 (1978); Note, *State Constitutional Guarantees as Adequate State Ground: Supreme Court Review and Problems of Federalism*, 13 AM. CRIM. L. REV. 737 (1976); Note, *Rediscovering the California Declaration of Rights*, 26 HASTINGS L.J. 481 (1974).

110. *See supra* note 5 and accompanying text.

111. 456 U.S. 798 (1982).

112. 453 U.S. 454 (1981).

113. 100 Wash. 2d 686, 674 P.2d 1240 (1983).

> frustration of the arrest itself or the destruction of evidence by the arrestee. [The Court subsequently, however,] with little or no reasoned analysis, expanded the exception until it threatened to swallow the general rule that a warrant is required. From [the time] *Preston v. United States*, 376 U.S. 367 (1964), was decided, until 1981, when the Supreme Court decided *New York v. Belton*, [citations omitted] . . . we neglected our own state constitution to focus instead on protections provided by [the Fourth Amendment].
>
> We choose now to return to the protections of our own constitution and to interpret them consistent with their common law beginnings. To do so, however, [we must] overrule . . . [other state cases that] are inconsistent with this opinion.[114]

This independent path recently was followed by the same court in *State v. Chrisman*,[115] where it ruled that an officer's warrantless entry into the defendant's room (to accompany the defendant) could not justify a plain view seizure of contraband found in the room. The state court rejected the Supreme Court's earlier decision in the same case[116] which had permitted the seizure under the Fourth Amendment. But the Washington Supreme Court did not reject the Court's interpretation of the Fourth Amendment; it simply rested its more protective decision on the Washington Constitution.[117]

These are only two recent examples of expansive state court decisions. Of course, by no means have a majority of state courts or state judges chosen this path. For example, a plurality of the Texas Court of Criminal Appeals in *Brown v. State*[118] recently indicated that it would follow the path cleared by the Supreme Court: until "statutorily or constitutionally mandated to do otherwise," the plurality intended to interpret the state constitution in harmony with the Supreme Court's opinions.[119] That view is probably shared by a majority of state

114. *Id.* at 699, 674 P.2d at 1247. In addressing the probable cause search, the court concluded that under state law, such a search could be justified only under exigent circumstances. *Id.* at 702, 674 P.2d at 1248.

115. 100 Wash. 2d 814, 676 P.2d 419 (1984).

116. 455 U.S. 1 (1982).

117. In a dissenting opinion, Justice Dimmick stated that clear rules are not assured when "we waffle between state and federal constitutions." 100 Wash. 2d at 864, 676 P.2d at 425.

118. 657 S.W.2d 797 (Tex. Crim. App. 1983) (en banc).

119. *Id.* at 799. The Texas court was reconsidering a case reversed and remanded by the Supreme Court. Texas v. Brown, 460 U.S. 730 (1983). On remand the defense raised the question of whether the court's first decision had rested on an independent and adequate state ground. In response to the plurality's statement of allegiance to the Supreme Court's rulings, one of the dissenters, Judge Teague, wrote: "To the plurality's implicit holding that the members of this Court now have the role of being nothing more than mimicking court jesters of the Supreme Court of the United States, taps should be blown, and flags flown at

courts.[120]

While many commentators applaud state court experiments to expand individual liberties, not all state courts are careful about how they report which law they are using—federal or state.[121] To the extent that they rely on state law, they clearly are not bound by Supreme Court rulings. However, to the extent that they apply federal law in an expansive manner, they threaten uniformity in federal law and ultimately risk Supreme Court review.

B. The Need for Uniformity in Federal Law: Applying the Federalism Brakes

Our federalist system assumes that within their respective spheres, the two judicial systems enjoy some autonomy.[122] Through largely self-imposed judicial retraints, the Supreme Court respects state autonomy and declines to review state law questions.[123] The state courts, however, are not limited to reviewing state law questions; in many cases state courts resolve both state and federal questions.[124] Now that

half-mast—on behalf of what was formerly a court that was a part of the independent appellate judiciary of the State of Texas." 657 S.W. 2d at 810 (Teague, J., dissenting).

120. The reason for the allegiance was explained in part by the Oregon Supreme Court in State v. Kennedy, 195 Or. 260, 265, 666 P.2d 1316, 1321 (1983) (footnote omitted): "This court like others has high respect for the opinions of the Supreme Court, particularly when they provide insight into the origins of provisions common to the state and federal bills of rights rather than only a contemporary 'balance' of pragmatic considerations about which reasonable people may differ over time and among the several states. It is therefore to be expected that counsel and courts often will refer to federal decisions, or to commentary based on such decisions, even in debating an undecided issue under state law." However, the court warned that when it cites federal precedent in interpreting Oregon law, it does so because it finds that precedent persuasive, not because it feels bound to do so.

See also Note, *Stepping into the Breach: Basing Defendants' Rights on State Rather Than Federal Law*, 15 AM. CRIM. L. REV. 339, 340 (1978) (most state courts follow federal law because of concern for "uniformity, simplicity and consistency of law enforcement, as well as their deference to the Supreme Court").

121. For a good model of how a state court may forge more expansive state law and be clear about what law is being used, see State v. Kennedy, 195 Or. 260, 265, 666 P.2d 1316, 1321 (1983).

122. *See* THE FEDERALIST No. 82 (A. Hamilton) (the state courts have concurrent powers with the federal courts unless they are prohibited). Professor Tribe states that the Constitution "presumes the existence of states as lawmakers and governmental institutions distinct from the federal government." L. TRIBE, AMERICAN CONSTITUTIONAL LAW 114 (1978).

123. *See supra* notes 21-23 and accompanying text.

124. Where both state and federal arguments have been raised, the suggestion has been made that the state court should address and dispose of the state issue first, relieving the court of opening itself to Supreme Court review on the federal question. *See* Massachusetts v. Upton, 104 S. Ct. 2085, 2089 (1984) (Stevens, J., concurring); Year-End Report of the Judiciary 23 (1981) (Chief Justice Burger recommending this procedure); Carson, *"Last Things Last": A Methodological Approach to Legal Argument in State Courts*, 19 WILLAM-

state law has been "federalized" by the incorporation doctrine,[125] state criminal decisions, for example, almost always present federal law issues.[126] When state courts resolve those federal issues in a manner that extends federal law beyond the limits set by the Supreme Court, the Court will be careful to measure the state court rulings against the need for uniformity in federal law.

The desire for a single set of federal standards is not new. It finds its roots in *Martin v. Hunter's Lessee*,[127] where the Court addressed its constitutional authority to exercise appellate review over state court judgments. In discussing the motive for such authority, the Court stated:

> That motive is the importance, and even necessity of *uniformity* of decisions throughout the whole United States, upon all subjects within the purview of the constitution. Judges of equal learning and integrity, in different states, might differently interpret a statute, or a treaty of the United States, or even the constitution itself: if there were no revising authority to control these jarring and discordant judgments, and harmonize them into uniformity, the laws, the treaties and the constitution of the United States would be different in different states, and might, perhaps, never have precisely the same construction, obligation, or efficacy, in any two states. The public mischiefs that would attend such a state of things would be truly deplorable; and it cannot be believed that they could have escaped the enlightened convention which formed the constitution. What, indeed, might then have been only prophecy, has now become fact; and the appellate jurisdiction must continue to be the only adequate remedy for such evils.[128]

The Court explicitly recognized that it would have the final say in interpreting federal law. In other words, a good argument can be made that our federal system was *not* intended to be tripartite in nature, comprised of (1) federal law, (2) state law, and (3) federal law as finally interpreted and applied by the state courts. Arguably, however, such a system currently exists because in interpreting federal law, state courts have some room for experimentation.[129] Because the Court does not

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ETTE L.J. 641 (1983); Galie & Galie, *State Constitutional Guarantees and Supreme Court Review: Justice Marshall's Proposal in* Oregon v. Hass, 82 DICK. L. REV. 273 (1978) (urging the Supreme Court to require states to address state issue first).

125. *See supra* notes 98-101 and accompanying text.

126. State defendants are usually well advised to raise and preserve the federal issues as a possible vehicle for later collateral review in the federal courts. *See* Rose v. Mitchell, 443 U.S. 545, 581 (1979) (Powell, J., concurring).

127. 14 U.S. (1 Wheat.) 304 (1816).

128. *Id.* at 347-48.

129. *See supra* note 94.

always grant plenary review to rule on these experiments, some state-interpreted federal law exists.[130] But this does not mean that state courts are necessarily immune from Supreme Court review when they decide federal issues.

The need for uniformity in federal law was recently echoed by state court judges. At the 1982 Conference of Chief Justices, the participants considered the advisability of legislation designed to reduce federal court jurisdiction and permit state courts to have the final say on controversial issues such as busing, prayer in schools, and abortion. A unanimous resolution by those present expressed concern for such proposals; the reason—lack of uniformity in federal law. The resolution stated in part:

> C. State court litigation constantly presents new situations testing the boundaries of federal constitutional rights. Without the unifying function of United States Supreme Court review, there inevitably will be divergence in state court decisions, and thus the United States Constitution could mean something different in each of the fifty states;
> D. Confusion will exist as to whether and how federal acts will be enforced in state courts and, if enforced, how states may properly act against federal officers . . . .[131]

The same reasoning would seem to apply with greater force to state decisions affecting the federal criminal justice field, where a federal crime may involve several states.

Not all agree that uniformity in federal law necessarily requires Supreme Court review of expansive state court rulings. For example, in his dissent in *Michigan v. Long*,[132] Justice Stevens noted that he would permit Supreme Court review only in those cases where a federal right had been *denied*.[133] Thus, if a state court vindicated a federal right, no review would lie. Justice Stevens would apparently extend

130. In Michigan v. Long, 103 S. Ct. at 3477 n.8, Justice O'Connor noted that the state courts handle the bulk of the criminal cases and that because state courts are required to apply federal constitutional standards, a "considerable body of federal law" is created.

Although the Court may permit some state-created federal law to stand, ultimately a state court's position may provide one side of a conflict between state and federal courts and provide the Court with the opportunity to address that position in a later case. *See supra* note 93 and accompanying text.

131. Resolution I—Resolution Relating to Proposed Legislation to Restrict the Jurisdiction of the Federal Courts (Jan. 30, 1982 meeting of the Conference of Chief Justices, Williamsburg, Virginia), *reprinted in* 128 CONG. REC. S2242 (daily ed. Mar. 17, 1982). *See generally* Gressman & Gressman, *Necessary and Proper Roots of Exceptions of Exceptions to Federal Jurisdiction*, 51 GEO. WASH. L. REV. 495 (1983).

132. 103 S. Ct. at 3489 (Stevens, J., dissenting). *See supra* notes 82-85 and accompanying text.

133. 103 S. Ct. at 3490-91 (Stevens, J., dissenting).

that view even in cases where the state court provided greater protection than the Supreme Court would. Others share his view, arguing that to review such state decisions is unduly intrusive and disrespectful of state autonomy.[134] This argument ignores the fact that when a state court vindicates a federal right, it may deny or limit other federal rights or interests.[135] Perhaps more importantly, without the possibility of Supreme Court review serving as a check on runaway state court expansions of federal rights, the fears of the Supreme Court in *Martin v. Hunter's Lessee*[136] as well as those of the 1982 Conference of Chief Justices[137] might be realized.

The desire for uniformity of federal law does not provide a license for the Court to intrude unnecessarily upon state autonomy. No doubt the Court itself realizes that point, but when a state court rules on federal law, the Supreme Court faces a potential jurisdictional question. It must balance state autonomy and the Supremacy Clause.

Although the Court is not always consistent in screening state court decisions, it does not treat state autonomy lightly. Nor does it take lightly the need for uniformity in federal law. When a state court's momentum has resulted in an expansive federal ruling, the Supreme Court may intrude and apply the federalism brakes.

III. Burger Court Federalism: Lopsided?

The Burger Court's disposition of state court decisions, especially those decisions affecting individual liberties, has been criticized. Some of the criticism has been leveled at the Court's practice of vacating and remanding a state court decision for purposes of obtaining clarification.[138] Other critics assert that while principled federalism should encourage state courts to expand individual rights, the Burger Court has adopted a "[l]opsided federalism . . . which demonstrates neither repect for state court autonomy nor regard for individual rights."[139] This section examines that two-fold criticism.

To better understand the present Court's posture concerning state autonomy and protection of state defendants' rights, it is important to note that while the Court may restrain some federal criminal proce-

134. *See* Oregon v. Hass, 420 U.S. 714, 726 (1975) (Marshall, J., dissenting); Welsh, *supra* note 3, at 874.

135. *See* Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605, 631-35 (1981).

136. 14 U.S. (1 Wheat.) 304 (1816). *See supra* notes 127-28 and accompanying text.

137. *See supra* note 131 and accompanying text.

138. *See supra* notes 44-46 and accompanying text.

139. *See* Collins & Welsh, *The Court vs. Rights*, *supra* note 3, § A, at 31, col. 6.

dural rights,[140] it does not discourage state courts from expanding state criminal procedural rights.

The implicit mistrust of state courts, which was evident in the Warren Court rulings on criminal procedure, seems to have temporarily vanished. In its stead is the Burger Court's general deference to state procedures and decisions. The Court's recent decisions involving federal habeas corpus review of state criminal trials[141] and its application of the Tenth[142] and Eleventh[143] Amendments vividly demonstrate a respect for state autonomy. That respect was again demonstrated in *Michigan v. Long*[144] in a majority opinion written by Justice O'Connor, a former state appellate judge.

A. Showing Respect for State Autonomy: The *Michigan v. Long* Balance

Whenever the Supreme Court grants plenary review in a state case, the Court will to some degree "intrude" upon areas of state autonomy.[145] The issue then is not whether it did intrude, but whether the intrusion was necessary. Where the state court has ventured to expand federal law, the Court will be justified, in the interest of uniformity and the Supremacy Clause, in granting plenary review.[146] Where it is not clear whether the basis for the state court decision is state law or federal law, the Court is justified in remanding the case to the state court for clarification.[147] That procedure in itself demonstrates respect for state courts. The Court merely conveys to the state court that it has an interest in the federal issues presented in the case. The state court has ample opportunity to "insulate" its opinion from Supreme Court review

140. Even here the Burger Court's record is mixed. For example, the Court extended the right to counsel in Argersinger v. Hamlin, 407 U.S. 25 (1972), but whittled away Fourth Amendment protections. *See* Michigan v. Long, 103 S. Ct. 3469 (1983) (extended *Terry* "stop and frisk" to passenger compartment of car); Illinois v. Gates, 462 U.S. 213 (1983) (abandoned rigid *Aguilar-Spinelli* test).

141. The Court has recently tightened the exhaustion requirements for state defendants who seek collateral relief in federal courts. *See, e.g.*, Rose v. Lundy, 455 U.S. 509 (1982). The underlying rationale is based upon federal-state comity. Darr v. Burford, 339 U.S. 200, 204-05 (1950).

142. *See, e.g.*, National League of Cities v. Usery, 426 U.S. 833 (1976).

143. *See* Pennhurst State School & Hosp. v. Halderman, 104 S. Ct. 900 (1984).

144. 103 S. Ct. 3469 (1983).

145. Professor Wechsler has suggested that one of the major virtues of direct review is its "marginal intrusion" upon state authority. In his view, "federal adjudication is confined to cases where it is a bare necessity to maintain the effectiveness and uniformity of the federal law." Wechsler, *The Appellate Jurisdiction of the Supreme Court: Reflections on the Law and the Logistics of Direct Review*, 34 WASH. & LEE L. REV. 1043, 1056 (1977).

146. *See supra* notes 127-128 and accompanying text.

147. *See supra* notes 40-41 and accompanying text.

by responding that its decision rests on independent and adequate state grounds.

With the advent of the new *Michigan v. Long* "assumption" rule, however, it should no longer be necessary to vacate and remand ambiguous state court judgments. Under the *Long* rule, the Court assumes that a state decision appearing to rest primarily on federal grounds does so, unless a clear statement to the contrary appears. This rule is straightforward, easily applied, and—perhaps most importantly—presents a reasonable balance between state autonomy and federal supremacy.[148] The rule is not designed to serve as a means of "intrusion." Rather it presents the state courts with a clear and unmistakable reminder of their autonomy and their ability to insulate expansive interpretations of federal law from Supreme Court "intrusion." The option rests with the state courts.

The rule encourages experimentation. By reminding state courts of their important role, the Supreme Court places the decision to experiment in the hands of the state courts.[149] It is difficult to see, therefore, how the rule might be viewed as either unduly intrusive or as having a chilling effect on state courts. The *Long* rule does not instruct state courts *how* to decide state law questions when a narrow federal law is also applicable. If they wish to rely on more expansive state law grounds, they may.

On its face, the *Long* rule places no new burdens on state courts nor any new local political pressures.[150] Instead, it recognizes that when there is a potential clash between state autonomy and the

148. *See* Schlueter, *Judicial Federalism and Supreme Court Review of State Court Decisions: A Sensible Balance Emerges*, 59 NOTRE DAME L. REV. 1079 (1984).

149. The Court in *Michigan v. Long* stated that the rule would "provide state judges with a clearer opportunity to develop state jurisprudence unimpeded by federal interference . . . ." 103 S. Ct. at 3476.

150. Professor Welsh has correctly suggested that local political pressures may constrain state judges who might otherwise overcome a reluctance to question restrictive Supreme Court decisions. Activist state courts open themselves to conservative groups in opposition to expansion of rights. However, it is more difficult to agree with his suggestion that "the 'Burger Court's policy of reversing expansive state judgments plays into the hands of those [opponents].'" Welsh, *supra* note 3, at 822. The implication is that the Court should not review expansive state decisions for political reasons. The Supreme Court's concern is with application and interpretation of federal law. The fact that its decisions might have political impact on the local level does not justify abandoning its constitutional role. Assuming a state court feels political pressure to follow a more conservative line, whether it attempts to expand the "law" on federal or state grounds, should make no difference. If it expands state law, it risks political pressure. If it expands federal law, it risks both political pressure and Supreme Court reversal. Declining to review the latter case would not relieve the political pressure.

Supremacy Clause, the state courts may choose whether the Supreme Court reviews their decisions and intrudes upon state autonomy.

B. Respect for State Autonomy: What About the State Defendant's Rights?

The Burger Court respects the autonomy of state courts, as long as expansive state court rulings do not threaten the uniformity of federal law. Critics of this born-again respect for state autonomy fear unacceptable costs to criminal defendants in state courts. They argue that because the Burger Court is reducing some federal criminal procedural protections, state criminal defendants will also be worse off. To some extent this is true—but only if the state courts follow the federal path established by the Supreme Court. States are free to strike an independent path and use state law to fill any gaps left by the Supreme Court. Thus, it is likely that state defendants will be better off than their federal counterparts in some cases.[151]

Critics combat this argument by asserting that the Supreme Court's treatment of expansive state court decisions discourages state courts from expanding defendants' rights.[152] They are only partially correct, however. The Court's treatment of expansive state decisions grounded on federal law is a justified signal to state courts that the Court is *the* final arbiter of federal law. Absent a constitutional amendment, it seems unlikely the Court will abdicate that role. Because the Court declines to review state cases expanding *state* law, the Court's decisions should not in themselves discourage state experimentation. In other words, the solution to the critics' concerns involves educating the state courts about their truly independent and sovereign power to expand state civil liberties,[153] without limiting the Supreme Court's authority to review state decisions. *That* is principled federalism.

State response to more limited Burger Court rulings need not be reactionary[154] or disrespectful. Those courts desiring to forge independent and expansive state law may refer to case law[155] and com-

151. *See generally* Galie, *State Constitutional Guarantees and the Alaska Supreme Court: Criminal Procedure Rights and the New Federalism, 1960-1981*, 18 GONZ. L. REV. 221 (1983).

152. *See* Welsh, *supra* note 3, at 856; Collins & Welsh, *The Court vs. Rights*, *supra* note 3, § A, at 31, col. 6.

153. Considering the amount of commentary generated over the past decade and the repeated reminders by the Court itself, it is safe to conclude that the educational process is well under way.

154. *See* Collins, *Reliance on State Constitutions—Away from a Reactionary Approach*, 9 HASTINGS CONST. L.Q. 1 (1981).

155. *See, e.g.*, State v. Kennedy, 295 Or. 260, 266 P.2d 1316 (1983).

mentary[156] for guidance. Moreover, most state constitutions and statutes have specific guarantees that provide excellent vehicles for more expansive law. All the Supreme Court asks in *Michigan v. Long* is that the state court clearly announce the legal basis for its decision.

Conclusion

The plain import of recent Supreme Court opinions points to several observations about how the Court views state court decisions. First, the present Court greatly respects state autonomy and the independence of state courts. Second, the Supremacy Clause requires the Court to serve as final arbiter of federal law to achieve uniformity in federal law. This criterion may require reversal of a state court judgment if the state court expanded federal law beyond a line drawn by the Court. Finally, if it is not clear that the state court based its decision upon an independent and adequate state ground, it is not unduly intrusive for the Supreme Court to either remand the case for clarification or assume the absence of such a ground under *Michigan v. Long*.

None of the foregoing observations conflict with principled federalism; instead, they represent a fine, delicate balance between state autonomy and federal supremacy. That neither federal nor state liberties are expanded does not necessarily mean that the Court favors a lopsided federalism. Nor is the balance upset when state courts choose to follow more restrictive Supreme Court decisions rather than expanding their own state law.

Recent criticism of the Court's handling of state court decisions rests primarily on its disposition of *Michigan v. Long* and *Montana v. Jackson*. Although each case was handled in a slightly different procedural manner, both clearly demonstrate not only the Court's respect for the independence of state courts but also its extreme frustration from dealing with ambiguous state decisions. The fact that in each case the state government was appealing an expansive state decision simply reflects a symptom of state court response to judicial restraint on the part of the Burger Court. It thus highlights the Court's concern for deciding correctly whether the state court relied on state law, federal law, or both. More importantly, in neither case did the Court instruct the state court how to rule.

To the extent that commentators view these cases as threats to state court autonomy and as a symbol of lopsided Burger Court federalism, they are responding only to "unfortunate impressions."

156. *See supra* note 109 and accompanying text.